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February 5, 1999

**VIA HAND DELIVERY:**

Karen Gulick, Esq.  
Office of Commissioner Tristani  
Federal Communications Commission  
The Portals, Room 8-C302F  
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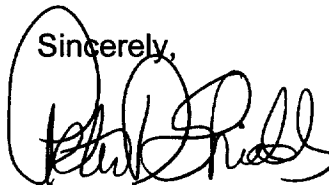
**Re: Summary of Comments in CMRS Spectrum Cap Proceeding  
(WT Docket 98-205, et al.)**

Dear Karen:

Please find enclosed for your use and review a summary of the first round of comments filed in the CMRS Spectrum Cap Proceeding, as we discussed. In addition, an original and two copies of the summary will be filed with the Secretary's office for inclusion in the docket of the above-captioned proceeding.

Please feel free to contact me with any questions concerning the enclosed materials.

Sincerely,



Peter D. Shields

Enclosure

cc: Magalie Roman Salas, Secretary  
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**FEDERAL COMMUNICATIONS COMMISSION  
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**Summary of Opening Comments**

**WT Docket 98-205, *et al.***

***1998 Biennial Regulatory Review – Spectrum Aggregation***

***Limits for Wireless Telecommunications Carriers***

**WILEY, REIN & FIELDING  
1776 K Street, N.W.  
Washington, D.C. 20006  
January 28, 1999**

## FOREWORD

What follows is a brief summary of the opening comments filed in response to the FCC's Notice of Proposed Rulemaking ("Notice") entitled *1998 Biennial Regulatory Review – Spectrum Aggregation Limits for Wireless Telecommunications Carriers*.<sup>1</sup> In the Notice, the Commission undertakes a comprehensive review of the 45 MHz Commercial Mobile Radio Service ("CMRS") spectrum cap and seeks comment on whether the cap should be repealed, retained, or modified. The opening comments were filed January 25, 1999. Reply comments are due February 10, 1999.

We have done our best to represent each commenter's positions accurately within a short space and in a consistent format. Due to space and time constraints, many supporting arguments have been truncated and rephrased. Accordingly, in all cases of particular importance, it is advisable to review the actual commenter's text.

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<sup>1</sup> *1998 Biennial Regulatory Review – Spectrum Aggregation Limits for Wireless Telecommunications Carriers*, WT Docket No. 98-205, *et al.*, FCC 98-308 (rel. Dec. 10, 1998).

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## **AIRTOUCH COMMUNICATIONS, INC. (“AirTouch”)**

**Interest: CMRS carrier**

### **Reassessment of the CMRS Spectrum Cap ¶¶ 32-48**

#### **Service in Rural Areas ¶¶ 44-46**

- The spectrum cap may have the unintended effect of precluding economies of scale and scope by carriers who would facilitate the provision of service to higher-cost rural areas. (AirTouch 18)

#### **Advancement of Competition in Local Markets ¶ 47**

- The CMRS cap is no longer necessary to promote competition. Commissioners Ness and Powell have touted the competitiveness of the CMRS industry in recent speeches. (AirTouch 5-6)
- Recent FCC orders support the conclusion that CMRS markets are either fully competitive or face sufficient competition and that it is in the public interest to relax some regulations traditionally applied to non-competitive markets. (AirTouch 6-7)
- Customers are not locked into one single carrier, and they routinely switch wireless carriers on the basis of price and service quality. (AirTouch 7)
- There remain numerous opportunities for mobile wireless entry. (AirTouch 8)
- While Congress did not explicitly define “meaningful economic competition,” the phrase should be interpreted under its plain meaning and in the context of the 1996 Act’s objectives. The Act seeks to promote competition in order to secure low prices and higher quality services for consumers and to encourage rapid deployment of new communications technologies. These objectives have been achieved in the CMRS market. (AirTouch 8)
- The Commission relies heavily on the presumption that the 45 MHz spectrum cap has facilitated the development of CMRS competition. Market-based and regulatory factors

other than the spectrum cap may have been more relevant to the development of the CMRS marketplace. These include: new market entrants, rapid technological changes, and narrowly focused regulatory requirements such as build-out benchmarks. (AirTouch 9-10)

- Other actions, including the Commission's auction of PCS spectrum in blocks of 30 MHz or less and build-out and substantial service requirements, have played a significant role in preventing warehousing of CMRS spectrum. (AirTouch 11)
- Digitalization of wireless services has done far more to promote efficient spectrum use than the spectrum cap. (AirTouch 11)
- The only legitimate reason for a spectrum cap is to prevent inefficient or anticompetitive consolidation of spectrum – a scenario that is extremely unlikely under current market conditions. For a predation strategy to work, a CMRS provider must be able to absorb the expense of warehoused spectrum and later recoup those costs through supracompetitive returns. In the current market, there is little room for CMRS providers to absorb expenses, particularly expenses of the magnitude involved in acquiring enough spectrum to reduce competition. (AirTouch 12-13)
- With the explosive growth in wireless usage, the spectrum cap artificially constrains capacity on those networks most successful in meeting demands, potentially limiting service quality and harming consumer interests. (AirTouch 16)

#### **Development and Deployment of New Technologies and Services**

##### **¶ 48**

- New and innovative services are being developed, including wireless data services and wireless local loop technologies. (AirTouch 8)
- The spectrum cap may impede the development of high-speed mobile data services and “third generation” services. (AirTouch 16)

## **Modifications and Alternatives to Existing CMRS Spectrum Cap ¶¶ 49-85**

### **Eliminate CMRS Spectrum Cap ¶¶ 79-85**

- The Commission should repeal the CMRS spectrum cap due to developments in the CMRS marketplace and the existence of meaningful competition. (AirTouch 1)
- It is unlikely that CMRS providers could exert market power by aggregating spectrum due to: the presence of actual and potential CMRS providers; the rapid rate of technological change creating incentives for competitors to “leap frog” each other; and the risk of loss of a license (the FCC will not intentionally license spectrum to a party intending to warehouse it). (AirTouch 2-3)
- The Commission notes that the spectrum cap has been “helpful” and “useful” in promoting competition. However, under Section 11, the cap must be “necessary” to promote competition. (AirTouch 9-10)
- The spectrum cap limit is essentially an arbitrary number imposed upon mobile service providers that will disserve the public interest by inserting inefficiencies into the market. (AirTouch 16)
- The FCC acknowledged the arbitrariness of the spectrum cap in the Part 27 Wireless Communications Service (“WCS”) proceeding by noting that, because of economies of scope, CMRS providers may be the most efficient users of WCS spectrum. The same rationale applies to a CMRS carrier’s provision of fixed or data-based services over aggregated CMRS spectrum. (AirTouch 16-17)

### **Proposals for Rural Areas**

- Retaining the spectrum cap will not promote competition in rural areas. Alternative measures, such as the following, will do more to promote rural competition: allowing the flexible partitioning of PCS service areas and spectrum disaggregation; enforcement of the FCC’s build-out rules for smaller BTA PCS licenses; and enhancing CMRS providers’ eligibility for universal service support. (AirTouch 17)



## **Merger Related Issues**

- The expense of acquiring new spectrum through transfer, not the spectrum cap, is primarily responsible for today's competitive market structure. (AirTouch 13)
- The spectrum cap constrains desirable mergers that would otherwise serve the public interest. (AirTouch 15)

## **Antitrust Enforcement**

- CMRS providers have always operated subject to antitrust laws and FCC review of acquisitions under the Communications Act. Thus, eliminating the spectrum cap will not lead to anticompetitive spectrum aggregation. (AirTouch 14)
- Where unlawful anticompetitive conduct occurs, CMRS providers are subject to Section 208 complaint procedures. (AirTouch 15)

## **AMERICA ONE COMMUNICATIONS, INC.**

**Interest: Wireless reseller**

### **Reassessment of The CMRS Spectrum Cap ¶¶ 32-48**

#### **Advancement of Competition in Local Markets ¶ 47**

- Modifying or eliminating the spectrum cap to allow greater spectrum aggregation could exacerbate the problems of a market that is not yet fully competitive. By allowing the cycle of spectrum aggregation and market consolidation to begin, the Commission may slow or reverse the competitive expansion that is underway and recent competitive gains may be erased. (America One 4)

#### **Merger Related Issues**

- The trend toward merger in the communications industry should give the Commission pause as it considers changes to the CMRS spectrum cap that could result in fewer market participants. In many cases, the surviving consolidated entities will exceed the current 45 MHz spectrum cap in a number of markets. (America One 3)
- Retaining the current rule would require these merged entities to divest themselves of one or more CMRS licenses, which would be available to new entrants and would increase diversity of ownership. (America One 3)

#### **Other Issues:**

- The Commission should retain and bolster the CMRS resale rule to foster competition in a market that is not yet fully competitive. This is especially true if the Commission were to permit greater spectrum aggregation. (America One 2)
- The disappearance of service options due to the elimination of facilities-based carriers through spectrum aggregation can be mitigated by the introduction of new service options offered by resellers. (America One 4)

## **AT&T WIRELESS SERVICES, INC.**

**Interest: Wireless service provider**

**Reassessment of the CMRS Spectrum Cap ¶¶ 32-48.**

### **Service in Rural Areas ¶¶ 44-46**

- An efficient firm that may otherwise be able to use additional spectrum in low-density areas of the country is prevented from doing so under the spectrum cap. (AT&T 7)
- The cap's attribution rules chill the timely roll-out of wireless services to unserved and underserved consumers. (AT&T 12)

### **Advancement of Competition in Local Markets ¶ 47**

- Most consumers now have a choice of at least four facilities-based CMRS providers. (AT&T 2)
- There is no evidence that the accumulation of any particular amount of spectrum causes harm to competition. (AT&T 8)
- There is compelling evidence that wireless markets are not particularly susceptible to the exercise of market power – either through anti-competitive collusion or through pernicious unilateral conduct. (AT&T 8)
- Wireless markets contain numerous well-capitalized actual and potential competitors and consumer demand for wireless services is rising every year. It would be relatively easy for existing competitors to add capacity in response to any price increase. For these reasons, no wireless provider could sustain a price increase for any significant period of time. (AT&T 8-9)
- A “per se” cap based on the predictive value of the Commission's market concentration models ignores the rapidly evolving nature of the market, the ability of firms to enter or expand output relatively easily in order to defeat an attempted price increase, and other pertinent factors. (AT&T 9-10)

## **Development and Deployment of New Technologies and Services ¶ 48**

- The spectrum cap impedes incentives to reduce prices, increase quality, and innovate because firms are less likely to be able to make additional sales in markets where they are already at or near the cap. (AT&T 7)
- A firm near or at the cap in a number of geographic markets has reduced incentives to invest in innovations that are intended to supplement regional or national service offerings if it would require more than 45 MHz in those areas. (AT&T 7)
- If additional spectrum is required to implement enhanced services, those services will be unavailable in markets where that firm is already at or near the cap. (AT&T 7-8)
- Reduced investment as a result of the attribution rules limits technological innovation. Investments in new technology benefit consumers by providing them with lower prices, new features, advanced capabilities, and more reliable service. (AT&T 12)

## **Modifications and Alternatives to Existing CMRS Spectrum Cap ¶¶ 49-79**

### **Modification of Ownership Attribution Thresholds ¶¶ 59-63**

- Conservative attribution rules, setting a ceiling lower than de facto control, create a disincentive to invest in new wireless services. The fast-growing wireless industry depends on the availability of investment capital to ensure that market participants can innovate and provide customers with the best products and services possible. (AT&T 10-11)
- The attribution rules, which make management agreements attributable, deprive new entrants of management expertise. (AT&T 11)
- In the event that the Commission does not repeal the spectrum cap, AT&T requests that the “twenty percent” attribution rule be repealed and that investments up to de facto control be permitted without attribution. (AT&T 10)
- Congress, the Commission, industry, and consumers agree that competition serves as the catalyst for lower prices,

increased choices, and technological innovation. Partial ownership or an interest in management neither reduces competition nor effectuates de facto control. Accordingly, the Commission should eliminate its burdensome rule and rely upon a case-by-case control test instead. (AT&T 12)

### **Eliminate CMRS Spectrum Cap ¶¶ 74-79**

- The Commission itself has recognized that the acquisition of spectrum may allow efficiencies that would otherwise not be available. In other contexts, the Commission has endorsed spectrum aggregation in order to enhance offerings to downstream consumers. (AT&T 4-5)
- The cap interferes with efficient allocation of resources because: (1) the rule prohibits potentially beneficial transactions that are not likely to create or enhance market power; and (2) the rule denies transactions in which the pro-competitive effects outweigh any anti-competitive harm. (AT&T 5-6)
- The cap prevents transactions that would not raise concerns even under traditional HHI analysis. There is virtually no relationship between the cap and the 1992 Merger Guidelines or traditional enforcement of competition policy. (AT&T 6)
- The cap prevents firms from attaining economies of scale and scope, which were the reason the Commission limited the number of cellular licenses available in markets initially. (See Analysis by Economists, Inc.) (AT&T 4, 6-7)
- The cap causes inefficient use of substitutes for cellular, broadband PCS, and SMR spectrum, distorting a firm's use of inputs and increasing production costs. (AT&T 7)
- To provide some certainty and to foster administrative efficiency, the Commission should retain a 45 MHz spectrum "safe harbor" below which a transaction will not trigger further review. (AT&T 10, 13)

### **Merger Related Issues**

- Mergers and other transactions involving the acquisition of more than 45 MHz of spectrum do not always result in levels

of market concentration that raise initial concerns under traditional standards of competition policy. (AT&T 8)

#### **Antitrust Enforcement**

- The public interest in promoting competition and economically efficient use of spectrum would be better served by case-by-case evaluation of the competitive effects of proposed spectrum license transfers, using the analytical tools developed by the antitrust agencies. (AT&T 13)

#### **Attachments (note level relied upon and for what purposes):**

- Economists Incorporated, *An Economic Evaluation of the Federal Communication Commission's Commercial Mobile Radio Services Spectrum Cap*. Relied on fairly heavily in (1) the discussion of the anticompetitive effects of the spectrum cap; and (2) the discussion of the inability of wireless providers to exercise market power in the absence of a spectrum cap.

## **BELL ATLANTIC MOBILE, INC. ("BAM")**

**Interest: Cellular carrier**

### **Reassessment of the CMRS Spectrum Cap ¶¶ 32-48**

#### **Service in Rural Areas ¶¶ 44-46**

- There is no discernable need for a spectrum cap to achieve the goal of nationwide availability of telecommunications services. BAM is not aware of any data showing that new wireless services are unavailable in rural areas. (BAM 19)

#### **Advancement of Competition in Local Markets ¶ 47**

- Hundreds of non-cellular providers have acquired CMRS spectrum and SMR licenses at auction, creating vigorous new competitors in CMRS markets. Wireless prices have declined. (BAM 15)
- Analysis of the CMRS market demonstrates that the cap is no longer necessary. BAM submits empirical evidence to support the following characterizations of the CMRS market. (1) Rapid competitive growth: 80% of the nation's population is served by at least three wireless carriers. (2) Lack of market concentration: CMRS providers can compete today with as little as 10 MHz of spectrum, and at least seven firms own at least this much in each MSA. BAM cautions that an increase in the HHI does not necessarily mean a reduction in competition. (3) Falling prices: statistical analysis demonstrates that prices fell when the first PCS competitor entered the market, but does not suggest that addition of subsequent competitors reduces prices further. (BAM 16-18)

#### **Development and Deployment of New Technologies and Services ¶ 48**

- The spectrum cap was not adopted based on any findings that it would promote wireless-landline competition or deployment of new services. There is no plausible basis today for linking these goals with caps. Without evidence of such a relationship, the FCC cannot carry the burden of proving (as it is required to do) that the cap is necessary to achieve these goals. (BAM 21-22)

- Rather than promote these goals, the spectrum cap undermines wireless-landline competition and the deployment of new services. (BAM 21-31)
- New spectrum must be made available -- not restricted -- to meet the explosive demand for mobile data services, including the rising demand for public safety communications and Internet access. Wireless carriers have had to deploy most of their spectrum to meet increasing demand for mobile voice services, leaving little spectrum available for other spectrum-intensive applications. (BAM 22-27)
- Broadband mobile services require significant spectrum in the 500 MHz to 3 GHz band. (BAM 24-25)
- The spectrum squeeze faced by CMRS providers will get worse if wireless becomes a true substitute for wireline service. (BAM 26)

## **Modifications and Alternatives to Existing CMRS Spectrum Cap ¶¶ 49-79**

### **Modification of 45 MHz Limitation ¶¶ 54-59**

- The current spectrum cap should be eliminated, not replaced by a modified rule. The same arguments weighing against maintaining the cap at its current level apply to modifying (raising or lowering) the cap. (BAM 32-34)

### **Eliminate CMRS Spectrum Cap ¶¶ 74-79**

- The cap should be repealed because it has achieved its stated goal of promoting new CMRS entry and competition. (BAM 14-18)
- The FCC should assess whether the cap is necessary to avoid the loss of competition -- not whether the cap would preclude some erosion in the number of competitors. There is no "correct" number of competitors. (BAM 9)
- BAM offers economic analysis (see Declaration of Crandall and Gertner) showing that a cap is not needed to safeguard CMRS competition. (BAM 9-13)
- Elimination of the cap will not foreclose markets. Far more CMRS spectrum is available today than when the cap was



initially imposed (180 MHz compared to 50 MHz). Also, new digital technologies permit more efficient use of this spectrum -- wireless firms can now effectively compete with only 10 MHz of spectrum. (BAM 9-11)

- If a firm acquires so much spectrum in a market as to raise concerns about potential market foreclosure, the FCC may make more spectrum available for CMRS use and firms may move spectrum to CMRS uses. (BAM 11)
- Elimination of the cap will not raise coordinated interaction concerns. Existing market conditions are such that new PCS entrants lack incentive to engage in such conduct with cellular firms. (BAM 13)
- The Commission has recognized in other contexts (e.g., its wireline "set-aside" rule for cellular service) that initial licensing rules are not to remain in place indefinitely where, as here, they were primarily intended to promote new entry. (BAM 18)
- The spectrum cap prevents an efficient spectrum market. (BAM 27-28)
- The cap distorts competition by arbitrarily discriminating between different mobile services. The cap restricts spectrum ownership for PCS, cellular and SMR services, but not for wireless mobile data services, mobile satellite services, and wireless communication services. (BAM 29-30)
- The cap also discriminates against mobile services in favor of fixed providers. For example, LMDS and other services are not saddled with spectrum restraints. (BAM 30-31)
- In addition to harming competition, the cap violates the principle of regulatory symmetry. (BAM 31)

### **Proposals for Rural Areas**

- Maintaining the cap will not increase the number of competitors in rural areas. Indeed, the spectrum cap is in place today, but there are more competitors in urban than in rural areas -- this is simply because new licensees construct in urban areas first. Furthermore, the Commission should not confuse the number of competitors with competition.

Finally, maintaining the cap could actually impede CMRS providers' efforts to bring competitive new services to rural areas, particularly those requiring up-front investment. (BAM 17-21)

- There is no basis in the record to suggest that a modified ownership restriction will promote the provision of new wireless services to rural areas. Only eliminating the cap and allowing access to spectrum will advance this goal. (BAM 33)

### **Antitrust Enforcement**

- Existing antitrust remedies act as an additional safeguard to rectify market failure or attempted exercise of market power. (BAM 13)

### **Other Issues:**

- As a matter of law (pursuant to sections of the 1996 Act and earlier statutes governing CMRS), the FCC has the burden of proving that the spectrum cap is necessary to achieve the goals set forth in the Notice. Also, Section 11 of the Act mandates "zero-based" rulemaking, which requires the FCC to start from the premise that no regulation is necessary, unless it can prove otherwise. (BAM 6-7, 14-15)

### **Attachments (note level relied upon and for what purposes):**

- Declaration of Drs. Robert W. Crandall and Robert H. Gertner. This declaration is cited extensively throughout BAM's comments to support the contentions that: there is no economic basis for continuing the spectrum cap; the cap reduces consumer welfare; elimination of the cap will not harm competition; the FCC should combat market foreclosure by making more spectrum available, not through a cap; existing CMRS market conditions will prevent coordinated interaction between firms; existing antitrust remedies are effective safeguards against market failure; and evidence of vibrant CMRS competition weighs against renewing the cap. (BAM 9-13)
- Declaration of Dr. Charles L. Jackson. This declaration supports BAM's contention that there is underutilized spectrum suitable for mobile uses that could be made available for CMRS, in the event that a single carrier

acquires so much spectrum as to raise concerns about market foreclosure. (BAM 11-13)

## **BELLSOUTH CORPORATION**

**Interest: CMRS provider**

### **Reassessment of the CMRS Spectrum Cap ¶¶ 32-48**

#### **Service in Rural Areas ¶¶ 44-46**

- The high cost/low-margin characteristics of rural areas necessarily mean they are unlikely to be the immediate targets of new entrants or competitors. Thus, the spectrum cap is ineffective at encouraging greater competitive entry when simple economics preclude it. (BellSouth 12)

#### **Advancement of Competition in Local Markets ¶ 47**

- The fact that the wireless market has become substantially competitive, marked by “vigorous and ever increasing competition,” demonstrates that the time is now to eliminate the CMRS spectrum cap. (BellSouth 3,7)

#### **Development and Deployment of New Technologies and Services ¶ 48**

- The development and introduction of new advanced services and technologies, including new third generation/IMT-2000 services, will require access to large amounts of additional spectrum. The 45 MHz cap effectively forecloses existing carriers from having access to the new spectrum needed to offer these services. (BellSouth 10)

### **Modifications and Alternatives to Existing CMRS Spectrum Cap ¶¶ 49-79**

#### **Modification of 45 MHz Limitation ¶¶ 54-59**

- At the very least, the Commission should modify the cap to increase the amount of spectrum available to wireless carriers. (BellSouth 3)
- The Commission could adopt a processing threshold instead of a spectrum cap. This would require applicants to identify in their application if they will exceed some specified number of MHz, in which case they must demonstrate that the proposal serves the public interest. This case-by-case

method of reviewing possible anticompetitive results is highly preferable to a spectrum cap. (BellSouth 15)

- In order to continue to provide service enhancements, the Commission must increase the cap if it is not eliminated. (BellSouth 19-20)

#### **Modification of Ownership Attribution Thresholds ¶¶ 59-63**

- Alteration of the cap's attribution rules is not a viable solution because it does not directly address carriers' increased spectrum needs. Any revisitation of the attribution rules would be arbitrary. (BellSouth 21)

#### **Forbearance From Enforcing The CMRS Spectrum Cap ¶¶ 63-71**

- If the spectrum cap rule is not warranted, the Commission should eliminate it outright rather than temporarily forbearing from enforcement. (BellSouth 18)
- Carriers will not have the incentive and certainty they need to make investments under the cloud of a dormant spectrum cap rule. (BellSouth 19)

#### **Sunset CMRS Spectrum Cap ¶¶ 71-74**

- If the Commission is not ready to rely solely upon market forces, despite the showing that the public interest will be served by doing so, the solution is to sunset the spectrum cap. (BellSouth 16)
- A two-year sunset is most consistent with the biennial review process established by Section 11. Alternatively, the Commission could set the sunset date at five years from the Commission's issuance of D, E, and F Block broadband PCS licenses. (BellSouth 17)

#### **Eliminate CMRS Spectrum Cap ¶¶ 74-79**

- Eliminating the spectrum cap will allow CMRS providers to compete more effectively with LECs. The existing spectrum limit constitutes a significant constraint on these firm's abilities to offer wireless local loop or high-speed mobile data services, either on a stand-alone basis or bundled with mobile voice services. (BellSouth 8)

- Elimination of the cap will allow broadband providers to increase their non-voice offerings, including paging and mobile-data, to better compete with narrowband CMRS providers that are not subject to the cap. (BellSouth 8)
- In the absence of a cap, current licensees would be able to leverage their economies of scope to lower prices to consumers, allowing these carriers to make the most efficient, cost-effective use of spectrum. (BellSouth 11)

### **Proposals for Rural Areas**

- Elimination of the spectrum cap will provide the competing rural service providers with the ability to provide better, cheaper service, and will incent other carriers to offer service in such areas. (BellSouth 5-6)
- Rather than relying upon an expensive and time-consuming waiver mechanism, the Commission should simply eliminate the spectrum cap and allow the public in rural areas to begin to reap the benefits of efficiently-used spectrum, even if only by a few carriers. (BellSouth 13)

### **Merger Related Issues**

- It does not serve the public interest to prevent a willing seller from transferring spectrum to a willing buyer who values it more highly, even though the buyer would hold over 45 MHz. (BellSouth 14)

### **Antitrust Enforcement**

- To the extent residual concerns regarding competition remain, they can be addressed by other, less restrictive means. Existing antitrust laws, transfer and assignment review polices, and complaint procedures are available to police against anticompetitive conduct, should it occur. (BellSouth 5, 14)

## **CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOC. (“CTIA”)**

**Interest: Association of wireless carriers and equipment vendors**

### **Reassessment of the CMRS Spectrum Cap ¶¶ 32-48**

#### **Service in Rural Areas ¶¶ 44-46**

- Rural areas will not be affected by elimination of the spectrum cap. Build-out is a competitive issue and is accomplished in response to perceived demand. As long as build-out obligations remain, service will be extended to rural areas. Further, as costs to provide service decrease, the geographic reach will be expanded. Unnecessary regulatory costs slow growth by making it more costly to do so. (CTIA 11-12)
- It may be more cost effective for cellular licensees in rural areas to acquire unneeded spectrum from PCS licensees to expedite provision of digital PCS services in parts of the cellular licensee's territory. For one, the incumbent enjoys lower fixed costs because of the existing facilities that are present (towers, etc.). (CTIA 12)

#### **Advancement of Competition in Local Markets ¶ 47**

- The advancement of competitive forces provides a sufficient check on CMRS rates and practices. (CTIA 4)
- Opportunities for collusion are not likely in the context of the wireless market. Other industry factors, like rapid technological progress, increased demand, and the expanding fringe of alternative providers, all make collusion unlikely. (CTIA 7-8)

#### **Development and Deployment of New Technologies and Services ¶ 48**

- An inflexible, stringent cap on spectrum may impair a carrier's ability to provide advanced (3G) wireless services and local exchange services. (CTIA 3, 14)

## **Modifications and Alternatives to Existing CMRS Spectrum Cap ¶¶ 49-79**

### **Forbearance From Enforcing The CMRS Spectrum Cap ¶¶ 63-71**

- In the partial ownership context (where a competitor has an ownership interest in the licensee), a spectrum cap is not necessary to prevent unreasonable or discriminatory carrier practices. The FCC has found that ownership interests of less than 20% are not cognizable and permits management agreements without prior approval. (CTIA 8-9)
- The 45 MHz cap is not necessary for consumer protection. The FCC has relied upon similar competitive forces to forbear from enforcement in other contexts (tariff forbearance). While recent forbearance decisions have focused on consumer protection, these values are not at issue here. (CTIA 9-11)
- Forbearance is in the public interest. A bright-line inflexible cap is inappropriate. The spectrum is licensed; thus, the FCC and other agencies must pass on transfers anyway. Further, given the fact that the spectrum is licensed, there is no need for a cap to ensure multiple providers. (CTIA 13-16)
- A case-by-case determination is superior. Market concentration is not a perfect proxy for market power. HHI numbers alone do not tell the complete story. Other factors must be considered and the CMRS market lends itself to such determinations including an analysis of the product market, geographic market, market share, and efficiencies. These factors cannot be determined on an industry-wide basis, but rather require a case-by-case determination. (CTIA 16-20)
- Diversity of ownership and fear of limited PCS entry are not reasons to retain the spectrum cap. Innovation and efficiency are public interest benefits that were not intended to be sacrificed for these goals. (CTIA 20)

### **Antitrust Enforcement**

- The FCC has found that Sections 201 and 202 will protect consumers. (CTIA 4)



- Antitrust case law and the Merger Guidelines reject automatic prohibitions in favor of a case-by-case approach. Further, the threshold is at the 35% concentration level. Under a 45 MHz cap, the market share is only 26.5%, suggesting a more relaxed approach is appropriate. (CTIA 5-6)
- The Communications Act and federal antitrust laws provide for a case-by-case review. The FCC has authority under Section 310 to approve transfers of control. Authority is also available under Section 7 of the Clayton Act. A cap is unnecessary. (CTIA 21-22)

## **CHASE CAPITAL PARTNERS**

**Interest: Equity organization investing in CMRS licenses**

### **Modifications and Alternatives to Existing CMRS Spectrum Cap ¶¶ 49-79**

#### **Modification of Ownership Attribution Thresholds ¶¶ 59-63**

- Section 20.6 defines too narrowly what constitutes an attributable interest and thus has the effect of reducing the availability of capital to CMRS providers. (Chase Capital 2)
- The spectrum cap rule should include a definition of “institutional investor” similar to the broadband PCS definition. Also, the 20% and 40% ownership benchmarks to determine attribution should be eliminated and replaced with a control test for institutional investors. (Chase Capital 4)
- The existing spectrum cap should be amended to provide an exception for institutional investors who do not exercise or have the potential to exercise control of, and do not have a majority equity interest in, a CMRS licensee. (Chase Capitol 6)
- The disparate attribution rules among different communications services unnecessarily affect the formation of telecommunications ventures and can distort the flow of capital. (Chase Capital 9)

#### **Forbearance From Enforcing The CMRS Spectrum Cap ¶¶ 63-71**

- Case-by-case forbearance is a second-best alternative to specific rules that provide clear guidance to investors and licensees alike. (Chase Capital 4)

#### **Eliminate CMRS Spectrum Cap ¶¶ 79-85**

- While the Commission is considering allocating additional spectrum for services that will compete with CMRS, any benefits associated with sunseting or eliminating the CMRS spectrum cap are likely to become clearer only as the licensing of such additional spectrum approaches. (Chase Capital 4)

## **D&E COMMUNICATIONS, INC. ("D&E")**

**Interest: Partner in PCS joint venture**

### **Reassessment of the CMRS Spectrum Cap ¶¶ 32-48**

#### **Service in Rural Areas ¶¶ 44-46**

- In smaller towns and rural markets, cellular incumbents continue to hold competitive advantages vis-à-vis market entrants. (D&E 5)

#### **Proposals for Rural Areas**

- The Commission should retain, in all but the largest urban markets, its current spectrum aggregation limits. (D&E 1)
- Because the wireless marketplace in most geographic areas is not yet truly competitive, the CMRS spectrum cap is still necessary to advance the goals touted by the Commission in establishing and maintaining the cap. (D&E 2)
- The Commission, in conducting this rulemaking, should not view the market for wireless telecommunications as a homogeneous national market with large, urban characteristics. Rather, the Commission must assess the actual state of competition that exists in all markets. (D&E 5)
- The Commission would be making a grave mistake by repealing or easing the CMRS spectrum cap before there are even entrants—much less viable competitors—in many markets. Otherwise, these new entrants will fall prey to the very anti-competitive conduct and entrenched market power of incumbents. (D&E 8)

#### **Merger Related Issues**

- The spate of recent mega-mergers, including Bell Atlantic-NYNEX, Bell Atlantic-GTE, AT&T-Vanguard Cellular, and SBC-Comcast Cellular, will result in spectrum cap issues. Mergers and acquisitions will give already formidable companies with large amounts of spectrum and existing customers even more spectrum and an additional established customer base in developing markets. The

market dominance and financial clout of such companies will have a negative impact on new entrants in these markets and will thwart the development of competition. New entrants must be given more than a year or two to establish a market presence prior to the elimination of the competitive safeguards of the spectrum cap. (D&E 8-9)

## **DiGiPH PCS, Inc.**

**Interest: PCS carrier**

### **Reassessment of the CMRS Spectrum Cap ¶¶ 32-48**

#### **Advancement of Competition in Local Markets ¶ 47**

- The spectrum cap promotes competition in markets where, in the absence of a cap, only a few carriers would dominate the marketplace. (DiGiPH 4-5)

### **Modifications and Alternatives to Existing CMRS Spectrum Cap**

#### **Modifications of Significant Overlap Threshold ¶¶ 50-54**

- At any given instance, the rigid percentage overlap set forth in the rules may not be appropriate. A case-by-case evaluation of a specific detailed showing made by a proponent for exceeding the current limitations would best serve the public interest. (DiGiPH 6)

#### **Modification of 45 MHz Limitation ¶¶ 54-59**

- In certain circumstances a single carrier holding in excess of 45 MHz in a given market may not frustrate either purpose behind the rule. However, unilateral increases in the cap to 55 MHz or 65 MHz without examination of the competitive landscape for the relevant markets would disrupt the delicate balance currently in place between incumbent cellular providers and 30 MHz PCS licensees. (DiGiPH 4)

#### **Forbearance From Enforcing The CMRS Spectrum Cap ¶¶ 63-71**

- The Commission should retain the current spectrum cap as a rebuttable presumption against spectrum acquisition beyond 45 MHz. As part of any application to exceed the 45 MHz spectrum cap, the carrier must show that lifting the 45 MHz spectrum cap would not result in a loss of meaningful competition. (DiGiPH 2)

#### **Eliminate CMRS Spectrum Cap ¶¶ 79-85**

- The purpose behind the CMRS spectrum cap was to discourage anti-competitive behavior, while at the same time maintaining incentives for innovation and efficiency. The

spectrum cap is still necessary to achieve these goals.  
(DiGiPH 3)

- DiGiPH opposes the elimination of the spectrum cap at this time. (DiGiPH 4)

### **Merger Related Issues**

- The current flurry of acquisitions between the largest wireless service providers should serve as a very real example of the far-reaching ramifications which any across-the-board rule change may have. With Bell Atlantic's planned acquisition of GTE and its previous acquisition of NYNEX, Bell Atlantic has a 50% ownership of PCS PrimeCo. Numerous market overlaps exist between Bell Atlantic and GTE and between GTE and PrimeCo. Indeed, up until several days ago, Bell Atlantic was looking to acquire AirTouch, which, through its acquisition of the US West wireless interests, accounts for the remaining 50% ownership of PrimeCo. (DiGiPH 7)
- "Merger-mania" among the large wireless providers should give the Commission great pause over any across-the-board relaxation of the rules. It is very likely that any increase in the spectrum cap will be relied upon in these transactions and the competitive ramifications will be felt immediately in the wireless marketplace. (DiGiPH 7)

## **GTE SERVICE CORP. ("GTE")**

**Interest: Local exchange carrier, wireless service provider**

**Reassessment of the CMRS Spectrum Cap ¶¶ 32-48**

### **Advancement of Competition in Local Markets ¶ 47**

- The mobile services landscape has changed dramatically since the CMRS spectrum cap was adopted. The amount of licensed spectrum has nearly quadrupled, new competitors are entering the market at an unprecedented rate, prices are declining, and carriers with regional and nationwide footprints are emerging. (GTE 6, 9-10)
- Marketplace and technological developments since adoption of the spectrum cap have transformed the industry. As a result, today's CMRS marketplace is robustly competitive with numerous operators offering or planning soon to offer a variety of services throughout many areas of the nation. (GTE 7-8)
- In light of the rapid evolution of the CMRS market since 1994, GTE suggests the FCC: (1) eliminate the spectrum cap; (2) retain the cellular cross-interest rule to alleviate concerns about the level of competitive options in under-developed markets; (3) rely on antitrust enforcement mechanisms to prevent anti-competitive conduct; and (4) continue to monitor CMRS market development to assess whether additional spectrum may be required in response to customer demand. (GTE 5-6, 11-12)
- The emergence of carriers such as AT&T Wireless, Sprint PCS, and Nextel, with nationwide service areas and pricing plans, markedly restrains the ability of any one provider to engage in anti-competitive conduct in any local market. (GTE 12)
- GTE's economic analysis indicates that a measure of market power must be based not on spectrum capacity alone, but on spectrum and equipment. (GTE 13)
- The amount of spectrum capacity any one provider requires to compete effectively is also relevant in assessing the ability

to exercise monopoly power. Advancements in wireless technology since adoption of the spectrum cap have increased the effective capacity of spectrum such that, given today's overall level of demand, one 10 MHz block of spectrum is sufficient to allow a wireless provider to compete for voice service in almost all regions of the country. (GTE 13-14)

- Declining entry barriers prevent the exercise of market power in the CMRS marketplace. The incremental cost of building cell sites and tower siting are both on the decline and the wireless marketplace has reasonable access to capital, all of which have steadily reduced barriers to entry. (GTE 16)
- Unilateral exercise of market power is limited by the durable nature of spectrum – *i.e.*, the fact that spectrum remains intact and available for use, even after a competitor exits the marketplace. This concept casts substantial doubt on concerns that a competitor could obtain market power in the CMRS marketplace. (GTE 17)

#### **Development and Deployment of New Technologies and Services** ¶ 48

- Continued enforcement of the spectrum cap will impede introduction of advanced services such as third generation technologies by incumbent mobile service providers. (GTE 19-22)
- GTE agrees with major equipment vendors that new spectrum will be necessary for 3G services, particularly in order to provide wireless Internet connectivity. The public interest calls for elimination of the CMRS spectrum cap to permit the deployment of these advanced offerings. (GTE 22)
- Continued application of the spectrum cap will hinder wireless carriers' ability to meet consumer demand for bundled and other wireless services. Wireless carriers will require access to spectrum beyond 45 MHz to meet demand for high-speed data services and bundled voice and data offerings. (GTE 23)
- Retention of the spectrum cap will inhibit carriers, regulators, and consumers from gaining valuable information regarding



the optimal functioning of the CMRS market. Absent this information, the Commission will never know the market distortions and inefficiencies produced by the arbitrary cap limit. (GTE 24)

### **Modifications and Alternatives to Existing CMRS Spectrum Cap**

- The tremendous changes in the CMRS market in the last four years and the structural attributes of that market suggest that the spectrum cap is an unnecessary anachronism. The Notice has offered a number of lesser alternatives to the cap – some of these lesser alternatives are fundamentally flawed because they maintain the problems inherent in the existing cap regime and ignore the competitive marketplace. (GTE 27)

### **Eliminate CMRS Spectrum Cap ¶¶ 79-85**

- GTE supports elimination of the spectrum cap. Continued application of the cap will impede the introduction of new technologies, hinder wireless carriers from meeting customer demand for bundled and other advanced wireless services, and result in significant inefficiencies. (GTE 19-27)
- Absent removal of the cap, economies of scale associated with (1) the provision of advanced data and voice services over the same wireless networks and (2) joint marketing and billing of voice and data services cannot be realized. (GTE 26)
- Maintenance of the cap has a chilling effect on investment and innovation because the inefficiencies created by the cap make CMRS carriers less desirable to investors. (GTE 26-27)

### **Cellular Cross-Interest Rule Modifications ¶¶ 79-85**

- The Commission may wish to retain the cellular cross-interest rule to alleviate concerns about the level of digital roll-out in rural areas. The Commission should assess whether sunset of the rule may be appropriate as digital PCS and SMR coverage extends to such regions. (GTE 30 and n.91)

## **Proposals for Rural Areas**

- GTE appreciates the concern regarding the relatively slow introduction of digital service in rural markets. There is, however, no evidence that retention of the spectrum cap will expedite delivery of digital offerings to rural areas. (GTE 28)
- Due to the complexities of the market definitions associated with the services included in the cap, lifting the cap on a market-by-market basis may actually harm rural competition by encouraging inefficient divestiture of rural holdings in order to comply with the 45 MHz limit. (GTE 28)
- Based on the evolution of cellular service (with metropolitan areas being covered first, followed by rural areas), and the FCC's construction requirements, it is logical to conclude that PCS and other digital offerings will eventually be provided in a nearly ubiquitous manner. (GTE 28-29)

## **Antitrust Enforcement**

- If carriers were somehow able to achieve the improbable feat of manipulating the highly competitive wireless marketplace to engage in anti-competitive or monopolistic practices, they would still risk substantial penalties under existing antitrust enforcement mechanisms for such conduct. (GTE 31)
- The Sherman and Clayton Acts provide for substantial penalties against anti-competitive carriers. These provisions are supplemented by the Justice Department's power to prosecute collusion criminally, the Federal Trade Commission's regulatory oversight, and the availability of private causes of action. (GTE 31-32)

## **Attachments (note level relied upon and for what purposes):**

- GTE attached the Declaration of Economists J. Gregory Sidak and David J. Teece, which GTE's comments rely on for economic analysis. Sidak and Teece conclude that the spectrum cap should be abolished and that the Commission should rely on general antitrust enforcement mechanisms to protect competition in wireless markets.

## **MCI WORLDCOM, INC.**

**Interest: Inter-exchange carrier**

### **Reassessment of the CMRS Spectrum Cap ¶¶ 32-48**

#### **Service in Rural Areas ¶¶ 44-46**

- Removal of the spectrum cap is particularly troublesome if the Commission wants to encourage wireless competition for small towns and rural markets where the incumbent cellular carriers, which are predominantly owned by incumbent local exchange carriers, continue to hold competitive advantages. (MCI WorldCom 4)

#### **Advancement of Competition in Local Markets ¶ 47**

- A spectrum cap encourages diversity in spectrum ownership. A market that supports diverse ownership of spectrum will maximize innovation and price competition. (MCI WorldCom 4)

### **Modifications and Alternatives to Existing CMRS Spectrum Cap**

#### **Forbearance From Enforcing The CMRS Spectrum Cap ¶¶ 63-71**

- CTIA has failed to demonstrate that any of the three prongs of the forbearance test have been met. (MCI 7)
- Consumers do benefit from the spectrum cap and forbearance should not be granted. Because there is potential for increased consolidation and for more mergers, the opportunities for companies to lessen competitive choices for wireless services is high. This can be kept in check with the current spectrum cap. (MCI WorldCom 6)
- The spectrum cap has helped to foster competition, but a fully competitive and sustainable market structure has not yet emerged. Accordingly, retention of the cap is beneficial and forbearance should not be granted. (MCI WorldCom 7)

#### **Eliminate CMRS Spectrum Cap ¶¶ 79-85**

- MCI WorldCom, Inc. believes that the spectrum cap should be retained. (MCI 2)

### **Proposals for Rural Areas**

- Build-out of systems beyond urban areas has been slow and there is no basis to find that wireless offerings today in rural areas are substitutable for wireline. (MCI 3)

### **Merger Related Issues**

- Lists potential for increased consolidation as a result of mergers as a reason against forbearance. (MCI WorldCom 7)

## **DONALD R. NEWCOMB (“Newcomb”)**

### **Interest: Individual**

#### **Reassessment of the CMRS Spectrum Cap ¶¶ 32-48**

##### **Development and Deployment of New Technologies and Services ¶ 48**

- Currently, several wireless technologies are competing for consumer attention. If wireless spectrum can be cornered by a few deep pocket firms who hoard spectrum, the public will be denied access to a selection of wireless technologies. (Newcomb 1)

#### **Modifications and Alternatives to Existing CMRS Spectrum Cap ¶¶ 49-79**

##### **Modification of 45 MHz Limitation ¶¶ 54-59**

- The current 45 MHz cap should not be modified. 45 MHz is five times the bandwidth needed for implementing PCS technology, so this cap is generous. (Newcomb 1)

#### **Merger Related Issues**

- Temporary acquisition of excess bandwidth, in the course of mergers and acquisitions, should not be a bar to those acquisitions -- provided that the excess spectrum is divested within 18 months. (Newcomb 1)

## **NORTHCOAST COMMUNICATIONS, LLC (“Northcoast”)**

**Interest: PCS D, E, F block licensee**

### **Reassessment of the CMRS Spectrum Cap ¶¶ 32-48**

#### **Advancement of Competition in Local Markets ¶ 47**

- While there are PCS and SMR systems in many large cities, not all of the change in the market is pro-competitive. The cellular industry is undergoing significant “competition-eroding” spectrum consolidation. In light of the significant consolidation taking place despite the cap, elimination of it will only exacerbate these problems. (Northcoast 3-5)
- The spectrum cap has enabled small businesses to gain a foothold in the market. (Northcoast 4-5)
- The Commission has an obligation, under Section 309(j)(3), to promote economic development and opportunity for small businesses. (Northcoast 2)

### **Modifications and Alternatives to Existing CMRS Spectrum Cap ¶¶ 49-79**

#### **Modification of 45 MHz Limitation ¶¶ 54-59**

- The FCC should retain the 45 MHz limitation until all originally-licensed “small business” PCS and SMR entities have begun offering commercial service. (Northcoast 1)
- The elimination of the spectrum cap would “signal the death knell” for the small business segment of the industry. (Northcoast 5)

### **Merger Related Issues**

- The mergers and proposed mergers are examples of the “competition-eroding” spectrum consolidation in the wireless industry. (Northcoast 4)

## **OMNIPOINT COMMUNICATIONS, INC.**

**Interest: PSC Carrier**

### **Reassessment of the CMRS Spectrum Cap ¶¶ 32-48**

#### **Advancement of Competition in Local Markets ¶ 47**

- Merger, consolidation, and partnering are necessary for small CMRS providers due to limited available capital. (Omnipoint Communications, Inc. 4)
- Reasonable consolidation in the CMRS industry is necessary to capture efficiency gains through nationwide and regional management of systems, as well as to address the high costs of network building and deployment. Economies of scale are essential for wireless providers looking to partner in various markets. (Omnipoint Communications, Inc. 5-6)
- The concern of “spectrum hoarding” has largely passed since independent CMRS operators have gained entry into the wireless market and facilities-based competition is well underway. (Omnipoint Communications, Inc. 5)

### **Modifications and Alternatives to Existing CMRS Spectrum Cap ¶¶ 49-79**

#### **Modification of 45 MHz Limitation ¶¶ 54-59**

- In order for the CMRS industry to grow and mature, the Commission should raise the spectrum cap from 45 MHz to 70 MHz. The 70 MHz spectrum cap is reasonable since it will ensure that each market have at least three competitive CMRS providers. Raising the spectrum cap is necessary to allow the industry to capture efficiencies through innovative partnering and mergers. (Omnipoint Communications, Inc. 5-6)
- The development of third generation wireless technologies, such as high-speed data transmission, can only be accommodated by increasing the existing 45 MHz spectrum cap. (Omnipoint Communications, Inc. 4)

## **Proposals for Rural Areas**

- There should be only one spectrum cap (70 MHz) across all markets, including rural areas, since a spectrum cap that relies on a case-by-case adjudication, or one that cordons off rural areas (or any other segment of the market) will likely result in discouraging the development of competition in rural areas through innovative mergers, consolidations, and partnering. (Omnipoint Communications, Inc. 6-7)



## **PERSONAL COMMUNICATIONS INDUSTRY ASSOC. ("PCIA")**

**Interest: Trade association of wireless carriers and equipment vendors**

### **Reassessment of the CMRS Spectrum Cap ¶¶ 32-48**

#### **Service in Rural Areas ¶¶ 44-46**

- PCIA does not believe that rural relief is necessary. In rural and under-served areas, there is currently plenty of spectrum available. Spectrum in these areas is underutilized due to a lack of customers. (PCIA 17)

#### **Advancement of Competition in Local Markets ¶ 47**

- Independent PCS operations are still in the early stage of development and cellular operators remain the dominant wireless carriers. The FCC's conclusion that the cap is necessary to give PCS competitors a fighting chance against cellular operators remains true today. While the Commission has issued licenses to PCS operators, these systems have yet to be constructed. (PCIA 4-7)
- In one sense, the market is competitive. However, all competitors have not had the opportunity to establish themselves sufficiently to withstand a market concentration. The cap will assist these competitors gain a foothold in the marketplace. The current cellular duopoly has the power to crush other wireless providers but for the spectrum cap. First, they have a huge advantage in numbers of customers. Second, they control 71-87% of all wireless subscribers. (PCIA 7-9)
- PCS competitors are not sufficiently ingrained in the marketplace. Many have yet to attract their first customer. A change in the spectrum cap now is premature. The recent CMRS Competition Report supports that fact. (PCIA 9-10)
- Finally, PCS auction bidders relied upon the existing market structure when they bid on spectrum – especially during their initial construction period. The FCC should not change the rules now. (PCIA 10-11)

## **Development and Deployment of New Technologies and Services**

### **¶ 48**

- Contrary to others' claims, the spectrum cap actually encourages technical and service innovation. The cap has forced cellular operators to quickly upgrade their systems to digital. It also forced cellular operators to work with operators in adjacent markets to offer better roaming packages. Finally, the cap spurred the development of phones that can switch between three different transmission modes. (PCIA 12)
- If the FCC makes additional spectrum available (for 3G operations), then it should raise the cap proportionately. If the FCC finds that the cap is preventing a particular innovation or service, then the FCC has the option to waive the cap in that instance. (PCIA 13-14)

## **Modifications and Alternatives to Existing CMRS Spectrum Cap ¶¶ 49-79**

### **Modification of 45 MHz Limitation ¶¶ 54-59**

- The FCC should retain the 45 MHz broadband CMRS spectrum cap. The cap has spurred the development of competing facilities-based networks. (PCIA 1, 4)

### **Forbearance From Enforcing The CMRS Spectrum Cap ¶¶ 63-71**

- CTIA's forbearance petition does not meet the statutory test for forbearance. The FCC has twice found, once in 1994 and again in 1996, that the cap was in the public interest. (PCIA 15)
- PCIA rejects any proposal for a case-by-case approach to the spectrum cap. A bright line rule is particularly important here. The administrative costs and delays in any type of an antitrust review are significant. The proceedings will be long and drawn-out and would impose a burden on PCS carriers who would be forced to bear the burden to show the public interest injury. The First Circuit recognized that a bright line test is best in this instance. (PCIA 15-16)
- A bright line test brings certainty to financial markets and facilitates business planning. Stability in the money markets is especially important in the case of PCS where licensees are still constructing their systems. (PCIA 17)

### **Eliminate CMRS Spectrum Cap ¶¶ 74-79**

- Sufficient competition does not exist in the mobile two-way voice market to justify eliminating the CMRS cap at this time. Many PCS systems are under construction, eliminating the cap would destabilize this market and permit combined cellular/PCS operators to dominate. (PCIA 11-12)

## **RADIOFONE**

**Interest: Wireless carrier**

### **Reassessment of the CMRS Spectrum Cap ¶¶ 32-48**

#### **Advancement of Competition in Local Markets ¶ 47**

- Competition in the CMRS industry has changed dramatically since the rule's adoption. The existence of nationwide or near-nationwide providers alleviates the dangers of spectrum concentration by local companies. (Radiofone 5)
- Local and regional carriers such as Radiofone (the "last family-owned business to hold a cellular license for a top 30 market") should be able to acquire sufficient spectrum to compete in the evolving marketplace. (Radiofone 2, 6)

#### **Development and Deployment of New Technologies and Services ¶ 48**

- Forbearance from the cap would promote the FCC's goals of increasing services, reducing prices for new services, and fostering new technologies. (Radiofone 3)

### **Modifications and Alternatives to Existing CMRS Spectrum Cap ¶¶ 49-79**

#### **Forbearance From Enforcing The CMRS Spectrum Cap ¶¶ 63-70**

- Radiofone strongly advocates FCC forbearance from enforcing the CMRS spectrum cap. The spectrum cap is no longer necessary to protect consumers and spur innovation because of increased competition. (Radiofone 2-3)
- Forbearance, rather than elimination, would allow the FCC to review mergers and other transactions on a case-by-case basis. (Radiofone 5)

#### **Eliminate CMRS Spectrum Cap ¶¶ 74-79**

- Radiofone is not opposed to eliminating the cap, but believes that forbearance is an adequate option. (Radiofone 5-6)

## **Proposals for Rural Areas**

- Forbearance from the cap will foster advanced telecommunications services in rural markets. (Radiofone 7)

## **Antitrust Enforcement**

- The FCC should take a broader view of the telecommunications marketplace: “antitrust law does not require products to be perfect substitutes or that they be equally attractive to customers to be considered part of the same market.” Instead, services such as wireline telephones, pay telephones, paging and narrowband PCS compete in the same market as broadband PCS, cellular and SMR – thus, forbearance from the spectrum cap would not harm competition. (Radiofone 4)

## **Other Issues:**

- The timing of the FCC’s action is more crucial than its nature: resolution before the March 23 PCS Auction will eliminate regulatory uncertainty. Such action will encourage cellular incumbents to form other types of strategic relationships with C-Block licensees in their market, benefitting entrepreneurs and small businesses. (Radiofone 6-7)

## **RURAL TELECOMMUNICATIONS GROUP (“RTG”)**

**Interest: Trade group**

### **Reassessment of the CMRS Spectrum Cap ¶¶ 32-48**

#### **Service in Rural Areas ¶¶ 44-46**

- In some markets, as many as seven CMRS providers compete, leading to lower prices and development of new services. Rural areas have not enjoyed this level of competition. (RTG 5)
- Rural markets remain underserved by PCS and SMR services due to the high expense of providing coverage across large areas. (RTG 5)

#### **Development and Deployment of New Technologies and Services ¶ 48**

- Eliminating the cap will free carriers to introduce innovative services in consumer-friendly bundles. (RTG 10)

### **Modifications and Alternatives to Existing CMRS Spectrum Cap ¶¶ 49-79**

#### **Modification of 45 MHz Limitation ¶¶ 54-59**

- If the Commission does not eliminate the cap, it should at least substantially raise it to 90 MHz. (RTG 11)
- If the cap is raised to 90 MHz, a provider could acquire two cellular and one PCS license. Such a combination would enable the provision of new advanced communications services. (RTG 11)

#### **Forbearance From Enforcing The CMRS Spectrum Cap ¶¶ 63-71**

- The Commission is required to forbear from enforcing the spectrum cap because all three criteria under Section 10 are met. (RTG 6-9)
- The first two criteria are satisfied: enforcement of the cap is not necessary to ensure just and reasonable charges or practices, or to protect consumers. Competition among CMRS providers is strong in most areas. Even in those rural areas with little competition, forbearance would protect

consumers' interests by enabling competition (*i.e.*, by allowing incumbent cellular carriers to compete). (RTG 8)

- The third criteria is satisfied: forbearance is in the public interest and promotes competitive market conditions. Lifting the cap would enable new entrants and existing providers to expand their services in rural areas. Forbearance also will allow CMRS providers to compete more effectively with facilities-based wireline carriers. (RTG 9)

#### **Eliminate CMRS Spectrum Cap ¶¶ 74-79**

- Eliminating the cap will best serve the dual purposes of promoting competition and encouraging provision of new services to rural areas. (RTG 9-10)
- Carriers will not hoard spectrum for anti-competitive reasons, because such action would not be cost-effective. (RTG 10)

#### **Cellular Cross-Interest Rule Modifications ¶¶ 79-85**

- The cellular cross-interest rule should be eliminated. It is obsolete because it was created before PCS, SMR and other services emerged to compete with cellular carriers. Today, non-cellular providers compete with cellular providers regardless of whether the latter owns one or both cellular blocks. (RTG 12-13)
- Also, elimination of this rule will stimulate the roll-out of new services. (RTG 12-13)

#### **Proposals for Rural Areas**

- The most cost-effective way to foster the introduction of new services in rural areas is to allow existing rural cellular carriers to offer all CMRS spectrum-based services to their customers. (RTG 5-6)
- Large PCS and SMR providers are actively seeking out rural carriers to construct, operate and jointly market their PCS-based services through carrier affiliation agreements. Such arrangements are now rare because the rural carrier must commit to building out an area with a population greater than ten times its overlap area. (RTG 5-6)

- If the cap is lifted, a rural CMRS provider's ability to compete will depend more on the quality and price of its services than on its ability to acquire sufficient spectrum. (RTG 6)
- Lifting the cap will allow carriers to utilize economies of scale, without which expansion into rural areas is uneconomical. (RTG 10)
- A new rule (e.g., eliminating or raising the cap) should be applied nationwide, and not on a market-by-market basis. Such an approach could create a Catch 22: the cap should not be lifted until sufficient competition exists, but such competition would not arise unless the cap is lifted. (RTG 12)



**SBC WIRELESS INC., SOUTHWESTERN BELL WIRELESS INC., SOUTHWESTERN BELL MOBILE SYSTEMS, INC., PACIFIC BELL WIRELESS, SNET MOBILITY  
("SBCW")**

**Interest: PCS and cellular subsidiaries of local exchange carrier**

**Reassessment of the CMRS Spectrum Cap ¶¶ 32-48**

**Service in Rural Areas ¶¶ 44-46**

- It is unfair to presume there is a lack of new entrants in all smaller or rural service areas because the characteristics of communities are constantly changing. (SBCW 7)

**Advancement of Competition in Local Markets ¶ 47**

- With the growth of the wireless industry far exceeding early expectations, today's CMRS markets have from three to seven viable service providers offering various wireless alternatives. (SBCW 2)
- Competition has had the effect of dramatically lowering the price of handsets and services over time. (SBCW 4)
- The success of Pacific Bell Wireless in California and Nevada in signing almost a million customers in less than 2 years, despite the presence of long-time, established cellular carriers in each market, empirically demonstrates that the CMRS market is fully competitive. (SBCW 13)

**Development and Deployment of New Technologies and Services  
¶ 48**

- The goal of the Commission to ensure competition by limiting the allocation of spectrum has evolved into a barrier to competition for new and innovative services due to the near exhaustion of network capacity in many markets. (SBCW 2)
- The spectrum cap has the negative effect of preventing established competitors from acquiring spectrum that could be used to relieve network exhaustion and promote the introduction of additional features. (SBCW 4)

- CMRS consolidation has some advantages, including conferring upon service providers the technical ability and financial backing to introduce advanced technologies and extend the technologies geographically. (SBCW 9)
- An impediment to the introduction of innovative services is the exhaustion of allocated spectrum in high usage markets – the same markets that have sophisticated customers who demand additional features. (SBCW 9-10)
- As a result of the cap, there is the risk of limited availability of cell sites that can be readily acquired and constructed, resulting in fallow spectrum. (SBCW 10)
- SBCW has expended a large amount of capital to stretch its spectrum by converting its principal cellular markets from analog to digital. Digital migration is a continuing process because SBCW must continue to serve its analog customers. Due to the spectrum cap, adding new features creates a further demand on a network that is near capacity providing voice service alone. (SBCW 10)
- The spectrum cap also forces cellular operators to provide analog and digital voice service within a spectral bandwidth 5 MHz smaller than a PCS licensee operating in an MTA offering only digital voice service and potentially wireless data services. (SBCW 10)
- If service providers were free to acquire spectrum within their service areas as it became available from the established spectrum pool, the likelihood of introducing innovation would increase and the need to allocate more spectrum would be delayed. (SBCW 11)
- Should the FCC decide to dedicate a portion of the spectrum to third-generation wireless services, it is essential this use be excused from the spectrum cap. (SBCW 11)

## **Modifications and Alternatives to Existing CMRS Spectrum Cap ¶¶ 49-79**

### **Modification of 45 MHz Limitation ¶¶ 54-59**

- Establishing different percentages and a “floating” spectrum cap will inevitably result in commercial uncertainty and disparate regulation. (SBCW 11)

### **Modification of Ownership Attribution Thresholds ¶¶ 59-63**

- The ownership limitations contained in the current cap are outdated. Rather than changing them, the FCC should eliminate the spectrum cap. (SBCW 11)

### **Forbearance From Enforcing The CMRS Spectrum Cap ¶¶ 63-71**

- The three-pronged test necessary for the Commission to forbear has been satisfied – the wireless market is fully competitive. (SBCW 12)

### **Sunset CMRS Spectrum Cap ¶¶ 71-74**

- If the Commission chooses to forbear from enforcing the cap, it should also set a sunset date. A sunset provision would lend some certainty to forbearance. (SBCW 12)
- The suggestion of a market-by-market sunset date is unworkable and would inevitably result in regulatory disparity. (SBCW 12)

### **Eliminate CMRS Spectrum Cap ¶¶ 74-79**

- Elimination of the spectrum cap is the most appropriate method of setting aside outdated regulation and encouraging long term investment and innovation. (SBCW 3)
- The most likely definition of a product market for determining whether the cap should be eliminated is one composed of those services listed in 47 C.F.R. § 20.9, which defines various commercial radio services. These services compete for all, or some portion, of the same pool of customers. (SBCW 5)
- The geographic market in which elimination of the cap should be analyzed should not be limited to a particular service area definition, given that there is no meaningful overlap in how service areas are drawn and a national market virtually ignores the more narrow limitations of a designated service area. (SBCW 6)
- The most logical measure of market capacity for determining whether the spectrum cap should be eliminated is spectrum

assigned to the various carriers – customer numbers and usage are fluid, unspecific measures. (SBCW 6)

### **Cellular Cross-Interest Rule Modifications ¶¶ 79-85**

- Without repeal of the cellular cross-interest rules, termination of the spectrum cap is an incomplete solution. (SBCW 3)
- The cross-interest rule had some basis when there was a fear that the market could develop only one viable facilities-based carrier. That fear is no longer valid. (SBCW 13-14)
- Because the cross-interest rule is limited to cellular, there is a pre-existing question of parity that can be resolved through elimination of the rule. (SBCW 14)
- The cross-interest rule is not needed because the diversity of technologies (e.g., TDMA, CDMA and GSM) creates natural barriers to spectrum consolidation. (SBCW 14)

### **Proposals for Rural Areas**

- The Commission's market analysis in determining whether to eliminate the spectrum cap in small markets should include all suppliers. In addition, the cap should not be applied on a market-by-market basis in small or rural markets. (SBCW 7)
- The cap should not be applied on a market-by-market basis because what may be classified as a rural cellular market could well be part of an urban MTA. Also, due to population density, what may be defined as a rural service area on the east coast is often equivalent to an MSA in a less densely populated area. Such an approach might lead to inconsistent regulation of similarly situated CMRS providers. (SBCW 7)
- The cap is not an incentive to more vigorous competition in less densely populated areas – where there is less demand for service, there is less commercial interest. The appropriate question is whether elimination of the cap would impede competition and the answer is "no." (SBCW 7-8)
- To apply differing spectrum limitations to rural areas or other discrete geographic areas could result in uneven and unequal regulation. (SBCW 11)

- Development of the definition of “rural” would invite confusion because the various service areas are quite different and a rural community can easily evolve into a suburb. (SBCW 11)
- Creating a geographic division such that the cross-interest rule is not enforced where PCS is operable – mainly urban areas – but is enforced where PCS is not operable – mainly rural areas – would create an artificial regulatory barrier. (SBCW 14)

### **Merger Related Issues**

- Elimination of the cap would not impede competition because any transfer of control among wireless carriers must be approved by the Commission. (SBCW 8)
- Eliminating the cap will allow the FCC to conduct a reasoned analysis of the effect on competition of a proposed transaction instead of defaulting to an arbitrary limitation that may well prevent benefits to consumers. (SBCW 9)
- The dual approach to approving mergers – pursuant to which transactions under the cap would be subject to normal FCC review while transactions that resulted in aggregation in excess of the cap would be required to make an affirmative demonstration of the public interest benefits of the merger – is unnecessary and inefficient. (SBCW 12)

### **Antitrust Enforcement**

- Elimination of the cap would not impede competition because mergers and acquisitions over a certain threshold must be analyzed by the Department of Justice pursuant to the Hart-Scott-Rodino Act. (SBCW 8)

## **SONERA LTD. (“Sonera”)**

**Interest: Investor in C-Block PCS licensee**

### **Modifications and Alternatives to Existing CMRS Spectrum Cap ¶¶ 49-79**

#### **Modification of Ownership Attribution Thresholds ¶¶ 59-63**

- The Commission should clarify that its attribution standards do not require attribution of spectrum held by otherwise unaffiliated entities solely because those entities hold minority, insulated interests in the same licensee in another geographic area. (Sonera 4-5)
- The Wireless Telecommunications Bureau's broad interpretation of the attribution rule prohibits capital investment in the U.S. wireless industry and unnecessarily increases regulation of passive investors. Accordingly, the Commission should clarify that the scope of Section 20.6 is narrow and not applicable to minority and insulated owners. (Sonera 6-7)

## **SOUTHEAST TELEPHONE ("SouthEast")**

**Interest: Local exchange company**

### **Proposals for Rural Areas**

- Raising or eliminating the cap may be appropriate in urban areas, but not in rural areas. Such action may adversely affect entrepreneurial companies currently moving into PCS. The Commission must review the suggested changes with an eye to geographic concerns. (SouthEast 1)

## **SOUTHERN COMMUNICATIONS SERVICES, INC.**

**Interest: SMR carrier**

### **Reassessment of the CMRS Spectrum Cap ¶¶ 32-48**

#### **Advancement of Competition in Local Markets ¶ 47**

- The SMR dispatch service constitutes a distinct market. This market needs narrowly tailored regulations in order to ensure competition since the technological and commercial barriers to entry are substantial. In particular, Motorola iDEN technology is the only digital dispatch technology available. Yet, Motorola owns 20% of Nextel Communications, Inc., which is achieving market power in the SMR dispatch service market. (Southern Communications, Inc. 3, 5-7)
- Cellular and PCS telephone systems also face entry barriers to the dispatch market because their systems are designed to use their entire spectrum for cellular telephone service. Thus, these carriers face significant transition costs to meaningfully compete with Nextel for dispatch service customers. (Southern Communications, Inc. 6)

### **Modifications and Alternatives to Existing CMRS Spectrum Cap ¶¶ 49-79**

#### **Modification of 45 MHz Limitation ¶¶ 54-59**

- The Commission should modify the CMRS spectrum limit by adopting a "Presumptive SMR Spectrum Cap" of 15 MHz (or such amount as the Commission finds appropriate) in any "Economic Area." By ensuring that no single party can amass more than 70% of the 800 MHz spectrum, the Commission would ensure that the distinct SMR market will benefit from competition. At a minimum, the Commission should condition the participation in future auctions for SMR licenses upon the acceptance by participants of a SMR specific spectrum limit. (Southern Communications, Inc. 4, 7)

#### **Eliminate CMRS Spectrum Cap ¶¶ 74-79**

- Elimination of the CMRS spectrum cap "may benefit competition in other segments, but will not provide the



needed competition in the dispatch service market.”  
(Southern Communications, Inc. 7)

## **SPRINT PCS**

**Interest: PCS carrier**

### **Reassessment of the CMRS Spectrum Cap ¶¶ 32-48**

#### **Advancement of Competition in Local Markets ¶ 47**

- The spectrum cap is a simplified method to ensure that there is not over-concentration of ownership in the industry. (Sprint 10)

#### **Development and Deployment of New Technologies and Services ¶ 48**

- Deployment of second-generation digital technologies has had the effect of making the cap less intrusive on carriers. Second generation technologies have presented extraordinary increases in capacity over first generation analog (AMPS) technology. (Sprint 12)
- Deployment of new capacity-enhancing technology is no reason to eliminate the cap – to the contrary, these capacity-expanding technologies and future anticipated gains make the cap far more workable. (Sprint 13)

### **Modifications and Alternatives to Existing CMRS Spectrum Cap ¶¶ 49-79**

#### **Modification of 45 MHz Limitation ¶¶ 54-59**

- It is premature for the Commission to modify the present cap and permit the mobile market to become more concentrated. The Commission should wait until the next biennial review. (Sprint 16)

#### **Forbearance From Enforcing The CMRS Spectrum Cap ¶¶ 63-71**

- Forbearance from applying the 45 MHz CMRS cap will neither “promote competitive market conditions” nor “enhance competition among providers of telecommunications services.” (Sprint 15)

#### **Eliminate CMRS Spectrum Cap ¶¶ 74-79**

- The spectrum cap should not be eliminated. There appears to be no evidence that the current 45 MHz cap in any way

acts as a barrier to provision of any desired service. (Sprint 15)

### **Merger Related Issues**

- Recent merger proposals lead to the conclusion that the cap is still needed to ensure that competition now developing in the CMRS market is not destroyed by consolidation. (Sprint 7)
- Appendix B and C show that many of the CMRS licenses held in the proposed Bell Atlantic/GTE and Ameritech/SBC mergers overlap, resulting in a decrease in competition for the effected markets. (Sprint 7)

### **Attachments:**

- Attachment A: Paper by Dr. John Hayes, former economist with the DOJ Antitrust Division - Claims that concentration levels in most markets that Sprint has recently entered remain high with HHIs (Herfindahl-Hirschman Index) above 1900. Relied on to show that spectrum cap is still needed. (Sprint 4, 10-11)
- Attachments B & C: Maps showing the areas of overlap involving the Bell Atlantic/GTE properties and the Ameritech/SBC properties respectively. Used to show competitive choice will decrease as a result of mergers. (Sprint 7-8)

## **TELECOMMUNICATIONS RESELLERS ASSOCIATION (“TRA”)**

**Interest: Trade association for telecommunications resellers**

### **Reassessment of the CMRS Spectrum Cap ¶¶ 32-48**

#### **Advancement of Competition in Local Markets ¶ 47**

- The advancement of competition in local markets is best served by the 45 MHz spectrum cap and the cellular cross-interest rule. These rules provide the correct balance between efficiency and competition for the CMRS market. (TRA 10-11)
- There is no set number of CMRS service providers in a given market that is “enough.” A greater number of providers in a market is essential for more competition. Furthermore, competition should not be measured only by the number of wireless providers since wireless service is not an easily substitutable service and there is currently no wireless number portability. The substitutability and portability issues are impediments to competition since they discourage consumers from choosing competing services, which may be better and/or cheaper. (TRA 6-7)

#### **Development and Deployment of New Technologies and Services ¶ 48**

- The 45 MHz spectrum cap protects consumers by encouraging wireless service as a viable competitor to wireline. The best chance for wireless to be a broad-based alternative provider of local exchange service is to encourage the maximum number of facilities-based wireless providers in a given market. (TRA 9-10)
- The current spectrum cap ensures entry by the maximum possible number of facilities-based providers, which in turn, will facilitate unrestricted wireless resale. As in the interexchange market, resellers fulfill a critical role of preventing price discrimination, bringing lower prices to smaller consumers, spurring innovation, and creating price competition. (TRA 8-9)
- The Commission should be skeptical of claims that 45 MHz of spectrum is not enough to permit wireless competition to

develop. A larger number of wireless licensees is more likely to lead to a scenario where one licensee will focus on wireless local loop or other innovative uses of the spectrum. (TRA 10)

## **Modifications and Alternatives to Existing CMRS Spectrum Cap ¶¶ 49-79**

### **Modification of 45 MHz Limitation ¶¶ 54-59**

- TRA opposes modification of the 45 MHz limitation because it would encourage consolidation and discourage entry of the maximum number of full-service and/or facilities-based wireless providers. Ensuring the maximum number of facilities-based competitors is particularly important in the CMRS market because there is a finite amount of spectrum, which limits the number of facilities-based competitors in each market. (TRA 10-12)

### **Forbearance From Enforcing The CMRS Spectrum Cap ¶¶ 63-71**

- TRA opposes forbearance from enforcement of the CMRS spectrum cap because it would encourage consolidation in the CMRS market and discourage entry of the maximum number of full-service and/or facilities-based wireless providers. None of the three (3) prongs of the statutory forbearance test can be met. (TRA 13)

### **Sunset CMRS Spectrum Cap ¶¶ 71-74**

- TRA opposes a sunset of the spectrum cap because there is no "end point" to the need for vigorous competition from a wide range of service providers and the Commission is unable to predict whether and when elimination of the cap would be justified. (TRA 13)

### **Eliminate CMRS Spectrum Cap ¶¶ 74-79**

- TRA opposes elimination of the spectrum cap because it would encourage consolidation and discourage entry of the maximum number of full-service and/or facilities-based wireless providers. The more facilities-based providers in a market will ensure the best services at the lowest prices. Lifting the spectrum cap will also increase the need for regulation since the CMRS market does not have a sufficient number of strong competitors for the Commission to rely on market forces. (TRA 12)

## **Cellular Cross-Interest Rule Modifications ¶¶ 79-85**

- TRA opposes elimination/modification of the cellular cross-interest rule because cellular service providers remain the incumbent wireless providers everywhere in the country. Even in markets where PCS and SMR providers have entered, it is essential to maintain as many strong facilities-based wireless providers as possible. (TRA 13)

## **TELEPHONE AND DATA SYSTEMS, INC. ("TDS")**

**Interest: PCS and cellular service provider**

### **Reassessment of the CMRS Spectrum Cap ¶¶ 32-48**

#### **Advancement of Competition in Local Markets ¶ 47**

- The CMRS spectrum cap remains necessary to allow new entrants to develop their services. Many PCS licensees have yet to deploy networks in large areas of the country, and some auctions are still upcoming. It would be unfair to licensees such as TDS, who expect to recoup spectrum acquisition costs under the current regulatory structure, to alter the playing field before they can even begin deployment. (TDS 2-4)

### **Modifications and Alternatives to Existing CMRS Spectrum Cap ¶¶ 49-79**

#### **Modification of 45 MHz Limitation ¶¶ 54-59**

- The Commission should not raise the 45 MHz cap or otherwise loosen its existing Section 20.6 rules. (TDS 2)

#### **Modification of Ownership Attribution Thresholds ¶¶ 59-63**

- Emergence of competition in wireless markets justifies relaxing the attribution limits of Section 20.6(d) -- while still retaining the basic principle that cellular and broadband PCS licensees with significantly overlapping service areas ought to be independently controlled. (TDS 5-6)

### **Cellular Cross-Interest Rule Modifications ¶¶ 79-85**

- The cellular cross-interest rule should be amended to include the same ownership attribution rules as the CMRS spectrum cap. This would allow a party with a controlling interest in one cellular licensee to have a non-attributable interest in the other in-region cellular licensee. This change is justified by the emergence of PCS and ESMR services in many areas. (TDS 5-6)

## **TRITON CELLULAR PARTNERS, L.P. ("TRITON")**

**Interest: Rural cellular carrier**

**Reassessment of the CMRS Spectrum Cap ¶¶ 32-48.**

### **Service in Rural Areas ¶¶ 44-46**

- Because one of Triton's investors has interests in a PCS company creating a small overlap in Mississippi, the spectrum cap almost derailed an acquisition. Ultimately, the FCC granted Triton temporary relief, but strict application of the cap would have had one of the following negative effects: derailing the acquisition, eliminating the efficiencies Triton could bring to the market; reducing the investment of the conflicted investor, limiting Triton's available capital in a capital intensive enterprise; or causing partitioning of the overlap area, thereby depriving 30,000 Mississippi residents of a competing wireless provider. (Triton 2-3)

### **Proposals for Rural Areas**

- The cap should be liberalized, especially in rural areas, to permit investors to provide much needed capital for wireless companies. (Triton 1-2)
- The FCC must make sure its rules do not discourage investment in rural cellular carriers. Capital is needed to bring service to rural areas either through building new systems or acquiring existing systems and upgrading the facilities. Unlike wireless operators in large markets, rural operators typically cannot obtain financing through the public capital markets or existing cash flow. (Triton 4-5)
- The Commission should increase the geographic overlap standard in rural areas, where cellular RSA licenses are involved, to a higher standard, such as 55%, or increase the cap itself, or both. (Triton 6)
- The spectrum cap attribution rules, which attribute equity interests at the 20% level as well as officer and director positions, discourage investment in rural cellular companies and leave rural carriers unable to make desirable acquisitions. (Triton 5)



- The FCC should, at a minimum, modify the spectrum cap to provide that equity or positional (*i.e.*, officer and director) interests will not be attributed in the absence of actual control. (Triton 6)
- While there may be reasons to prevent a rural carrier from acquiring an overlapping license, there is no reason to prevent investment in multiple carriers. Investors seek to maximize return and will encourage each of the companies they invest in to compete. (Triton 5-6)

## **WESTERN WIRELESS CORPORATION (“Western”)**

**Interest: Wireless carrier**

### **Reassessment of the CMRS Spectrum Cap ¶¶ 32-48**

#### **Service in Rural Areas ¶¶ 44-46**

- The spectrum cap may preclude carriers from expanding operations to high-cost areas. (Western 8)

#### **Advancement of Competition in Local Markets ¶ 47**

- CMRS competition is intense and increasing dramatically irrespective of the spectrum cap. (Western 5)
- Reviews of market conditions in Denver and Oklahoma City (where Western currently has spectrum cap waiver requests pending) illustrate that the spectrum cap has no ongoing role in assuring that mobile voice markets become and/or remain competitive. (Western 8)

#### **Development and Deployment of New Technologies and Services ¶ 48**

- Aggregation of spectrum in excess of the present cap will facilitate introduction of new services and advanced technologies, including wireless local loop, high-speed data, and “3G” services which may not be technically feasible under a 45 MHz cap. (Western ii)
- The spectrum cap may preclude carriers from offering new wireless services. (Western 8)
- Although Western is moving forward with its provision of wireless local loop, the prospect of conflicts between this service and the spectrum requirements of mobile voice service remains. (Western 10)

### **Modifications and Alternatives to Existing CMRS Spectrum Cap**

#### **Forbearance From Enforcing The CMRS Spectrum Cap ¶¶ 63-71**

- If the Commission finds that its public interest mandate requires forbearance from enforcing, rather than outright elimination of, the spectrum cap rule, it may wish to allow

interested parties (including the Commission itself) to show, by specific and credible evidence, that a proposed grant, assignment, or transfer of control of a specific CMRS license will confer excessive market power on the grantee, assignee or transferee, thereby justifying enforcement of the cap. (Western 12-13)

### **Eliminate CMRS Spectrum Cap ¶¶ 79-85**

- The spectrum cap deters carriers from realizing potential economies of scale and scope. In cellular/PCS overlap areas, Western and its affiliates achieve cost savings from joint use of transmitting facilities, physical plant, technical staff and expertise, local and regional contacts (*i.e.*, for interconnection, zoning and contractors) and access to the resources and managerial expertise offered by a common corporate parent. (Western 8-9)
- Strict enforcement of the spectrum cap may interfere with the rapid deployment of networks or, where no such delay in deployment occurs, may result in no increase in the number of independent carriers serving a particular market or region. (Western 9)
- Western concedes that there is a remote possibility that a carrier could acquire sufficient CMRS spectrum to allow it to exert "excessive market power" by unilaterally restricting output and raising prices, but such an attempted monopolization would create an immense market opportunity for alternative carriers, whose entry would quickly restore the market's competitive status quo. (Western 11-12)
- Because the spectrum cap has: (1) proven superfluous as a stimulant for competition while imposing real costs on carriers striving to develop viable businesses; and (2) not proven to facilitate service to rural, high-cost areas, it should be eliminated. (Western 10)
- The pro-competitive rationale of the LMDS proceeding (in which the Commission rejected limitations on CMRS carriers' potential LMDS spectrum holdings in order to spur CMRS incumbents to offer fixed wireless, basic exchange service to compete with ILECs) militates in favor of either eliminating the spectrum cap or forbearing from its

enforcement in all but the most compelling cases. (Western 11)

### **Cellular Cross-Interest Rule Modifications ¶¶ 79-85**

- The reasons animating the cellular cross-ownership rule are receding as CMRS competition intensifies. Accordingly, the Commission should forbear from enforcing this rule unless an interested party (or the Commission itself) can show, by specific and credible evidence, that the acquisition of a particular cross-ownership interest will confer excessive market power on the entity seeking to acquire the cross interest; the prospective acquirer should be given an opportunity to rebut the showing, with the Commission determining whether the party opposing the acquisition has met its burden. (Western 4, 16)

### **Proposals for Rural Areas**

- Although rural areas should enjoy the benefits of competing wireless services, the spectrum cap is an awkward tool for promoting this objective because there is no evidence that the slow pace of PCS coverage in rural areas has been caused by a dearth of spectrum for would-be operators. (Western 13)
- Sound business practice, financial common sense, and the Commission's own rules compel operators to build capital-intensive PCS infrastructure in urban areas before focusing on less populated rural areas. The Commission has two rational courses of action at its disposal to encourage expansion of service to rural areas: (1) refrain from action pending further licensing and initiation of service by C, D, E, and F-block PCS licensees; or (2) take steps to affirmatively encourage existing and new licensees to serve rural, high-cost areas. (Western 13)
- The Commission's concern that the benefits of digital wireless service be brought to rural areas must be tempered by its expressed intent to rely on the marketplace and its obligation not to compel carriers to operate at a loss. (Western 14)
- Rather than rely on the spectrum cap, which was not designed to promote, and which may in fact discourage, service in rural areas, the Commission should immediately

adopt affirmative incentives to stimulate investment in rural areas by wireless carriers. The Commission should modify its universal service rules to create positive incentives for wireless coverage of rural and high-cost areas and, more importantly, should immediately eliminate existing disincentives for wireless carriers. (Western ii, 14-15)

### **Antitrust Enforcement**

- Existing regulatory mechanisms such as antitrust enforcement and the Commission's existing authority under Sections 308(b) and 310(d) of the Communications Act are formidable deterrents to attempts by CMRS carriers to restrict output and raise prices. (Western 12)

## **WIRELESS ONE TECHNOLOGIES, INC.**

**Interest: PCS and cellular carrier**

### **Reassessment of the CMRS Spectrum Cap ¶¶ 32-48.**

#### **Advancement of Competition in Local Markets ¶ 47**

- The spectrum cap ensures that small, regional businesses can compete against huge, national carriers in the provision of CMRS services. The prevalence of communications mergers increases the need to protect competition. (Wireless One 4)
- The auction process has not guaranteed enough small business participation. Many of the C Block auction winners are tied up in legal proceedings or otherwise have not been able to provide wireless services. This has left a significant void in the competitive landscape requiring maintenance of the spectrum cap. (Wireless One 4)

### **Modifications and Alternatives to Existing CMRS Spectrum Cap ¶¶ 49-79**

#### **Forbearance From Enforcing The CMRS Spectrum Cap ¶¶ 63-70**

- Forbearance from enforcing the spectrum cap would not benefit consumers and is not consistent with the public interest. (Wireless One 5)
- A case-by-case approach to enforcing the rule would not be practical. It is unrealistic to expect the FCC to handle what would be an enormous analytical burden. Further, a case-by-case approach would provide opportunities for competitors to use the process to hold up otherwise legitimate transactions. (Wireless One 5-6)

#### **Eliminate CMRS Spectrum Cap ¶¶ 74-79**

- The CMRS spectrum cap must not be eliminated. The FCC's 1996 findings affirming the cap are equally valid today. (Wireless One 3)

### **Cellular Cross-Interest Rule Modifications ¶¶ 79-85**

- The cellular cross-interest rule has fostered competition and should be maintained. (Wireless One 7)